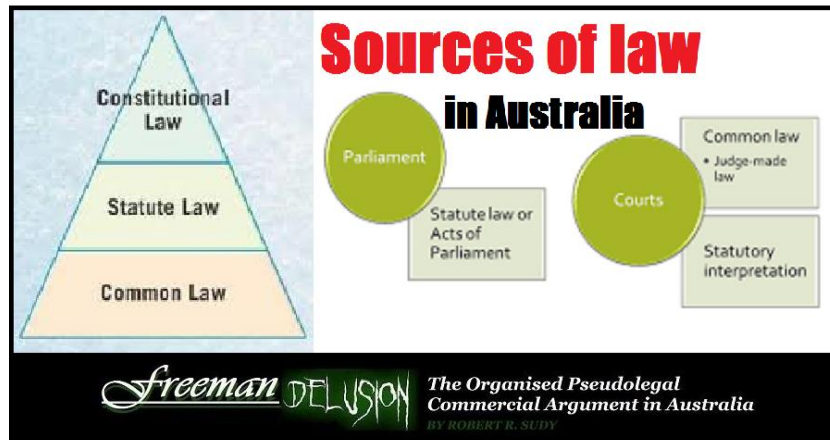
The Supremacy of Parliament



"It behooves us to remember that men can never escape being governed. They either must govern themselves or they must submit to being governed by others. If from lawlessness or fickleness, from folly or self-indulgence, they refuse to govern themselves, then most assuredly in the end they will have to be governed from the outside. They can prevent the need of government from without only by showing that they possess the power of government from within." - Theodore Roosevelt

Will the real common law please stand up?

There are a variety of OPCA myths concerning common law, from it's general meaning to it's supremacy over statute law or legislation. The common law theorist generally argues that to breach common law, implies that one would have to breach one of three alleged parts of this law, which they define as... harm to others, harm to their property, or mischief in contracts. Others describe it as "common sense law". OPCA ideology places a far different meaning and reliance on common law than exists in any legal system.

Though there are many different strains and theories of common law, a similar thread that runs through most of them is that the common law is a separate, parallel legal/judicial system, one independent from and not subordinate to statutory or written law. Every common law theorist or group has a slightly different explanation for the origins of and nature of their version of "common law," but the following broad summary of their beliefs is general enough to hold for most circumstances. The key, as mentioned above, is that these adherents believe in "common law" as independent of (and even hostile to) other alleged legal systems, rather than all being part of a whole.

Essentially, common law theorists argue that other forms of law have been used by unscrupulous lawyers, merchants and others to subvert and replace the common law. One such is "Roman Civil Law," which some argue is the system of law generally used in continental Europe. Roman Civil Law ignores rights to due process. Another form of law is Law Merchant, which deals not with money "of substance" (silver and gold), but rather with credit and negotiable instruments. These terms are often used interchangeably; one common law publication lists as types of "Roman Civil Law" all the following: Admiralty Law, Law Martial, Law Merchant, Maritime Law, Martial Law, Martial Law Proper, and Martial Law Rule. Commercial Law is very important to common law theorists, which governs commercial transactions "of substance".

What OPCA adherents refer to as "common law" is more realistically a form of natural law, not the common law as it is actually defined, as stated by Rookes ACJ in ***Meads v Meads ABQB [2012] 571 (CanLII)***:

> *"It is helpful at this point to make a few comments on the manner in which OPCA litigants often use the term "common law". OPCA litigants often draw an arbitrary line between "statutes" and "common law", and say they are subject to "common law", but not legislation. Of course, the opposite is in fact true, the "common law" is law developed incrementally by courts, and which is subordinate to legislation: statutes and regulations passed by the national and provincial governments. The Constitution Act provides the rules and principles that restrict the scope and nature of legislation, both by jurisdiction and on the basis of rights (ie. the Charter). Persons who claim to only be subject to the "common law" also do not appear to mean the current common law, but typically instead reference some historic, typically medieval, form of English law, quite often the Magna Carta, which, as I have previously observed, is generally irrelevant."*

The doctrine of s*tare decisis*

The term "common law" is itself common, but most people do not know exactly what it means. Its meaning, though, is pretty simple: it refers to unwritten, judge-made law (as opposed to written, or statutory, law). Centuries ago, in England, most petty crimes or complaints were settled by judge-made precedents, rather than elaborate legal codes. It is based in the doctrine of s*tare decisis,* or precedent, it is the body of law collected from legal decisions over the centuries, which is applied to future similar cases. This principle means that judges are obliged to respect the precedent established by prior decisions.

The words originate from the Latin maxim s*tare decisis et non quieta movere*: "to stand by decisions and not disturb the undisturbed." In a legal context, this is understood to mean that courts should generally abide by precedent and not disturb settled matters.

Under the doctrine of s*tare decisis*, common-law judges are obliged to adhere to previously decided cases, or precedents, where the facts are substantially the same. A court's decision is binding authority for similar cases decided by the same court or by lower courts within the same jurisdiction. The decision is not binding on courts of higher rank within that jurisdiction or in other jurisdictions, but it may be considered as persuasive authority.

The hierarchy of Laws

The Constitution is the highest form of law in Australia, and any legislation that is not consistent with the Constitution is declared invalid by the High Court. While these decisions are known as common law rulings, it does not imply that common law is superior to legislation, but rather it implies the superiority of the constitution over both other forms of law.

Statute law was originally the law of the King, which trumped local laws. The local laws *became* common law, but were administrated by the King (Henry II). It was actually his statute that allowed the common law courts to exist in the first place, and the statute was only accepted because it was valid in the grundnorm of the public. Statute law and common law validate each other, there's not one and then the other, but it is commonly accepted that the written law of the monarch, and therefore parliamentary

statute, trumps the unwritten law. But even the common law says that if you're under lawful arrest, you're under arrest whether you like it or not.

The aspect of where the King's Law actually comes from is one deeply rooted in philosophy and jurisprudence. There are two broad areas of jurisprudence; natural law and positive law.

Natural law is the philosophical theory that law comes from what is naturally right and wrong. For instance; A magpie is naturally entitled to eject anything from its territory that it perceives is a threat to its eggs. On the same notion, a person is entitled to eject anyone from their home that they perceive is unwelcome: See ***Plenty v Dillon (1991) HCA 5***.

Positive law is the theory that law is entirely man made, and instead of having a natural origin extends from a 'grundnorm' (what is popularly perceived as normal). Arguably both of these theories are true, and some laws extend from natural law and others (like taxation laws) resolve a man made problem.

The Kings Law (legislation) arguably comes from a positive law origin, and is/was accepted as law because it was popularly perceived that the King is more powerful than anyone else and should be obeyed. Personally I feel this theory is more accurate, and fits the changing landscape of government from a monarchy to a democracy as the monarchy is slowly rejected in the public grundnorm.

Some scholars argue that the King's Law might have come from a natural background, because humans are social animals who will naturally form a hierarchy in order to survive. However, I am personally of the position that this is not so, given the steady rise of democracy in the last 300 years.

There is a third jurisprudence of Religious Law, but this is not practiced in common law jurisdictions, as the enforcement of God's law is God's duty and not the duty of the courts.

Extract from the *Northern Territory Law Reform Committee*: Background Paper

> *"In the British tradition, sovereignty used to reside with the King or Queen as God's representative on earth, or at least in England. Thus the power of the King or Queen - also called the sovereign – was originally absolute. The sovereign could do whatever he or she wanted, and it was the law that whatever he or she did could never be wrong. Over time this changed. Beginning with Magna Carta in 1215 it was recognised that parliament also had some sovereign rights, that the making of future laws required the approval of parliament and that ordinary people had legal rights that the sovereign could not take away, without parliament's approval. Following this tradition, in Australia we now say that sovereignty resides with parliament, and the people elect the members of the various Australian parliaments."*

The reason why the common law decisions of the courts are overruled by legislation is succinctly stated in ***Durham Holdings Pty Ltd v New South Wales (2001) HCA 7***:

> *(at 30) "There is little point in searching for additional expositions of, or foundations for, the principle that courts will presume that legislation does not overrule the common law in the absence of clear and express terms, given that it is so clear and that it was not really contested by the State. In English legal history the principle can be traced back for at least 300 years and probably further. It has been applied countless times in Australia, including in the construction of*

legislation governing privately owned minerals and the public acquisition thereof. However, any presumption, rule of construction, or imputed intention is subject to valid legislative provisions to the contrary. Judges may decline to read such legislation as having such an effect. The more peremptory, arbitrary and unjust the provisions, the less willing a judge may be to impute such a purpose to an Australian lawmaker. But a point will be reached where the law in question is "clear and unambiguous". Various other verbal formulae are used in the reasoning of this Court to describe that point. They are collected by the Court of Appeal in its reasons. Once that point is reached, subject to any constitutional invalidity, the judge has no authority to ignore or frustrate the commands of the lawmaker. To do so would be to abuse judicial power, not to exercise it."

(at 48) "Secondly, the applicant invoked Sir Owen Dixon's reminder that the principle of parliamentary supremacy is itself a doctrine of the common law."

(at 61) "Members of a legislature, such as the Parliament of New South Wales, are regularly answerable to the electors, whereas judges in Australia are not. Judges recognise that, whatever the deficiencies of electoral democracy, the necessity of answering to the electorate at regular intervals has a tendency to curb legislative excesses. Many judges reject "the role of a Platonic guardian" and are "pleased to live in a society that does not thrust [that role] upon [them]". Most judges in Australia would probably share this relatively modest conception of their role. In this conception, the duty of obedience to a law made by a Parliament of a State derives from the observance of parliamentary procedures and the conformity of the resulting law with the State and federal Constitutions. It does not rest upon judicial pronouncements to accord, or withhold, recognition of the law in question by reference to the judge's own notions of fundamental rights, apart from those constitutionally established."

https://freemandelusion.com/wp-content/uploads/2019/06/durham-holdings-pty-ltd-v-the-state-of-new-south-wales-2001-hca-7.pdf

The courts cannot strike down legislation on their opinions that it isn't a good law, these are political concerns, not legal concerns, as stated in ***Union Steamship Co of Australia Pty Ltd v King (1988) HCA 55***:

"These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see Drivers v. Road Carriers (1982) 1 NZLR 374, at p 390; Fraser v. State Services Commission (1984) 1 NZLR 116, at p 121; Taylor v. New Zealand Poultry Board (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in Pickin v. British Railways Board (1974) AC 765, at p 782, is another question which we need not explore."

https://freemandelusion.com/wp-content/uploads/2019/06/union-steamship-co-of-australia-pty-ltd-v-king-1988-hca-55.pdf

In ***Kable v Director of Public Prosecutions (NSW) [1996] HCA 24***, Dawson J. (at 11-12) explains the principle of the supremacy of Parliament, expanding on the judgement in *Union Steamship Co of Australia Pty Ltd v King:*

> *"But the important thing is that for present purposes the words "peace, welfare, and good government" are not words of limitation. As this Court observed in Union Steamship Co of Australia Pty Ltd v King: "They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony (40). Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score."*
>
> *Up to that point, that passage would appear to be a complete answer to any suggestion that there are common law rights which are so fundamental that they cannot be overturned by legislation, but the Court added: "Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see Drivers v. Road Carriers (1982) 1 NZLR 374, at p 390; Fraser v. State Services Commission (1984) 1 NZLR 116, at p 121; Taylor v. New Zealand Poultry Board (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in Pickin v. British Railways Board (1974) AC 765, at p 782, is another question which we need not explore."*
>
> *Those words were prompted by remarks of Cooke J in the New Zealand Court of Appeal to the effect that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them" (Fraser v State Services Commission (1984) 1 NZLR 116 at 121). As this Court observed, that view was rejected by Lord Reid in Pickin v British Railways Board (1974) AC 765 at 782. There he said: "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution ... I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete."*
>
> *Lord Reid's reference to earlier times would appear to hark back to the view expressed by Coke CJ in Bonham's Case (1572). He said: "And it appears in our books, that in many cases, the common law will … control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void". Academic debate over the meaning of those words continues to the present time. It is unclear whether Coke CJ was intending to say that Acts of Parliament which are repugnant to the common law are void or whether he was merely laying down a rule of statutory interpretation. If he was intending the*

former, he appears to have had second thoughts, because in his Fourth Institute he described parliament's power as "transcendent and absolute", not confined "either for causes or persons within any bounds". He there contemplated the enactment of bills of attainder without trial and statutes contrary to Magna Carta without any suggestion of their invalidity.

However, Coke was not alone and there were other early expressions of opinion which appear to suggest that courts might invalidate Acts of Parliament which conflict with natural law or natural equity. But they are of academic or historical interest only for such views did not survive the Revolution of 1688 or, at the least, did not survive for very long after it. Judicial pronouncements confirming the supremacy of parliament are rare but their scarcity is testimony to the complete acceptance by the courts that an Act of Parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind. Indeed, it is a principle of the common law itself "that a court may not question the validity of a statute but, once having construed it, must give effect to it according to its tenor."

(at 16.)... In the New South Wales Court of Appeal, Kirby P expressed his agreement with Lord Reid in British Railways Board v Pickin (1974) AC 765. In BLF v Minister for Industrial Relations (1986) 7 NSWLR 372 (at 405) he said: "I agree with Lord Reid's conclusion. I do so in recognition of years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom. That unbroken law and tradition has repeatedly reinforced and ultimately respected the democratic will of the people as expressed in Parliament. It has reflected political realities in our society and the distribution of power within it."

https://freemandelusion.com/wp-content/uploads/2020/10/kable-v-dpp-nsw-1996-hca-24.pdf

The supremacy of Parliament was inherited by Australia as part of the Westminster system of government, as cited in ***Carnes v Essenberg [1999] QCA 339***:

"The supremacy of Parliament to make laws contrary to what had been the Common Law is expressly recognised by the Courts. It is enough to refer to the decision of the High Court in Kable v. The Director of Public Prosecutions, 189, Commonwealth Law Reports 51 at pages 73 to 74 in the judgment of Justice Dawson. His Honour pointed out that that champion of the Common Law, Chief Justice Coke, had in his Institute of the Laws of England in the early 17th century accepted that Magna Carta could be altered by English Parliament. Indeed he referred to Bills of Attainder which allowed for trial contrary to Magna Carta as being lawful enactments. Justice Dawson went on: "Judicial pronouncements confirming the supremacy of Parliament are rare but their scarcity is testimony to the complete acceptance by the Courts that an Act of Parliament is binding upon them, and it cannot be questioned by reference to principles of a more fundamental kind." The passage goes on and concludes: "There can be no doubt that Parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom."

https://freemandelusion.com/wp-content/uploads/2019/05/carnes-v-essenberg-1999-qca-339.pdf

The *Magna Carta*, which forms part of the common law, does not bind governments, as stated in ***Essenberg v The Queen [2000] HCATrans 297***:

“McHUGH J: I understand that and persons who have not had full legal training often think of Magna Carta and the Bill of Rights as fundamental documents which control governments, but they do not. After all, Magna Carta was the result of an agreement between the barons and King John and the barons themselves had their own courts, had their own armies, they, in effect, levied what we would call taxes today and they were concerned to protect themselves against the growth of the central power of the royal government, the central government, and that is how Magna Carta came into existence, but modern Parliament did not arise until late in the 17th century and the early struggle was between the King and the barons.

We are dealing now with the question of the legislature. I mean, Parliament established its authority over the monarch after the struggles which led to the execution of Charles I and the flight from the kingdom of James II in 1688. But Parliament – some people would regard it as regrettable – can, in effect, do what it likes. As it is said, some authorities could legislate to have every blue-eyed baby killed if it wanted to."

“… we are ruled by law and law is the law of Parliament; it is called legal positivism. It is the law laid down. This Court makes decisions and, unless they are constitutional decisions, the Parliament can overrule them and often does. We lay down a law, Parliament can change it. It is the democratic right of the people to do it through their parliamentary representatives. So, what you are faced with is the Queensland Parliament enacting this legislation, which you obviously think is a bad piece of legislation and infringement with your rights and which other members of the community think is a good thing, that is something to be debated at the ballot box, but it is not a constitutional matter…“

"Magna Carta and the Bill of Rights are not documents binding on Australian legislatures in the way that the Constitution is binding on them. Any legislature acting within the powers allotted to it by the Constitution can legislate in disregard of Magna Carta and the Bill of Rights. At the highest, those two documents express a political ideal, but they do not legally bind the legislatures of this country or, for that matter, the United Kingdom. Nor do they limit the powers of the legislatures of Australia or the United Kingdom. “

https://freemandelusion.com/wp-content/uploads/2019/05/essenberg-v-the-queen-2000-hcatrans-297.pdf

Any moral principle does not subtract from the supremacy of Parliament, as cited in ***Gargan v Director of Public Prosecutions and anor [2004] NSWSC 10*** (at 66):

"(i) the appeal to scripture, that is to a moral principle higher than parliamentary sovereignty, is “out of line with the mainstream of current constitutional theory as applied in our courts” (BLF v Minister for Industrial Relations (1986) 7 NSWLR 372 at 384 per Kirby P).

The same principle was applied by Lord Reid in British Railway Board v Pickin (1974) AC 765 in which he said: “In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded insofar as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete” (at 782)

To a like effect is the decision of the Privy Council in Liyanage v The Queen (1967) AC 259 in which it was held that an Act of the Parliament of Ceylon could not be challenged on the basis that it was contrary to the fundamental principles of justice. This argument fails."

https://freemandelusion.com/wp-content/uploads/2019/05/gargan-v-director-of-public-prosecutions-and-anor-2004-nswsc-10.pdf

The Origins of Parliamentary Supremacy

British Chief Justice John Fineux had once stated in 1519 that:

"The Law of God and the Law of the Land are all one, in the sense that they both protect the public good."

The phrase *"Law of the land"* is a legal term, equivalent to the Latin *lex terrae* (or *legem terrae* in the accusative case). It refers to all of the laws in force within a country or region, including both statute law and common law. English jurists, writing of legem terrae in reference to the Magna Carta, stated that this term embraces all laws that are in force for the time being within a jurisdiction. For example, Edward Coke, commenting upon Magna Carta, wrote in 1606:

"No man be taken or imprisoned but per legem terrae, that is, by the common law, statute law, or custom of England."

British Chief Justice John Vaughan further explained in 1677 that whenever the law of the land declares by a legislative act what divine law is, then the courts must consider that legislation to be correct. Justice Powys of the King's Bench confirmed in 1704:

"Lex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law...."

In 1765, ***William Blackstone*** wrote *"Commentaries on the Laws of England":*

"By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end.

For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other. This may lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The law of the land depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament.... Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament."

Magistrates Willes J, in *Lee v Bude & Torrington Junction Rly Co (1871) UK*:

"Are we to act as regents over what is done in Parliament with the consent of the Queen, Lords and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the courts are bound to obey it."

Albert Venn Dicey, a highly influential constitutional scholar and lawyer, wrote of the twin pillars of the British constitution in his classic work ***An Introduction to the Study of the Law of the Constitution*** *(1885)*. These pillars are the principle of Parliamentary sovereignty and the rule of law. The former means that Parliament is the supreme law-making body: its Acts are the highest source of English Law. A parliament can enact legislation dealing with any subject, and the legislation of the parliament is superior to the jurisdiction of the courts. Parliament has:

"…the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament."

Sir Ivor Jennings took the view that a parliament exists only in theory, because it *"is a legal fiction and legal fiction can assume anything"*. To demonstrate this, he once stated:

"If Parliament enacted that all men should be women, they would be women so far as the law is concerned".

In *Cheney v Conn [Inspector of Taxes] (1968 -U.K.)* Magistrate Thomas said:

"If the purpose for which a statute may be used is an invalid purpose, then such remedy as there may be must be directed to dealing with that purpose and not to invalidating statute itself. What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest from of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal."

Pickin v British Railways Board (1974) AC 765 confirms the legislative supremacy of the British Parliament:

"When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the Courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the statute book at all.

In earlier times many learned lawyers seemed to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice,

> *but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete. The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution."*

https://freemandelusion.com/wp-content/uploads/2020/11/british-railways-board-v-pickin-1974-ukhl-1.pdf

Legislative supremacy was also favored in the U.S. for several reasons. The legislative branch is most capable of reflecting the will/needs of the people, because they derive their power directly from the people via electoral consent. That way civil matters/laws are passed through proportional representation picked by the people. The executive branch is less accountable to the people, and therefore can't be trusted with the duty of the people. The Founding Fathers feared the nation could overturn to tyranny and had issues with the British government, and wanted to avoid an executive branch. In British history magistrates have been seen as a assistant to the throne and had even tried American colonists for braking British law. Colonists believed that the judicial branch of British government had abused its power and wanted to limit powers they received in American government.

The Common Law of England

English Common law is the body of precedent that had evolved over time in the higher courts of England, and it's what our common law was based on in the beginning, as it was also in the U.S. and many other nations, until they became self-governing. This was not a complete body of law that covered all aspects of judicial interpretation though, just specifically for interpreting the British statutes adopted here at the time. There arose many matters that had to be decided separately, that had no precedent to rely upon in the common law of England.

One good example would be the *Murrell* decision in the 1830's. In that case, an aboriginal man had murdered another aboriginal man, and the *"ratio decidendi"* or point of law in question was, regarding whether the Court had jurisdiction to hear the matter. There was no precedent regarding jurisdiction in a matter between two aboriginal people anywhere in the common law of England, so it had to be decided separately on its own merits. This decision was relied upon in future cases in Australia, where the elements were similar, primarily regarding the question of jurisdiction.

Westminster Parliament passed the *Australian Colonies Government Act* in 1850, first granting the right of legislative power to each of the six Australian colonies. The statutes that were introduced had no interpretative guides in the common law of England, and so, where ambiguity was an issue, the higher Australian courts decided the full extent or effect of a provision, just as the higher courts in England had done previously to create their common law. And so began a body of precedent separate from English precedent, occurring long before full legislative independence from Britain, or even the 1901 federation and constitution.

"*The common law in Australia*" means the decisions and precedents set by these higher courts in Australia, that must be relied upon under the doctrine of *stare decisis*. For a theorist to disregard *"The common law in Australia*" means they are disregarding many important judicial decisions specifically intended for interpreting the laws of this nation.

The Balfour Agreement at the Imperial Conference of 1926 recognized the sovereign right of each dominion to control its own domestic and foreign affairs, and declared that the self-governing dominions were to be regarded as

> *"…autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."*

https://freemandelusion.com/wp-content/uploads/2020/11/balfour-agreement-1926.pdf

Shortly after, the *Statute of Westminster 1931* was passed, and brought into effect in Australia by the ***Statute of Westminster Adoption Act 1942***. Section 2 deals with the *Validity of laws made by Parliament of a Dominion (28 and 29 Vict. c. 63):*

> *1. The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement. of this Act by the Parliament of a Dominion.*
>
> *2. No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."*

https://freemandelusion.com/wp-content/uploads/2020/11/statute-of-westminster-adoption-act-1942.pdf

After the passing of the ***Australia Acts 1986***, section 80 of the *Judiciary Act 1903* was amended by the ***Law and Justice Legislation Amendment Act 1988*** where the wording *"Common law of England"* was replaced with *"Common law in Australia"* to reflect this distinction.

> *No. 120 of 1988 - Section 41 Common law to govern: (1) Section 80 of the Principal Act is amended by omitting "common law of England" and substituting "common law in Australia". (2) The amendment made by subsection (1) applies for the purposes of proceedings instituted after the commencement of this section."*

Section 80 of the ***Judiciary Act 1903*** now provides:

> *80 Common law to govern: "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."*

There exists in our law many decisions that have their foundation in the common law of England, that are still binding on our courts. But with the evolution of ***responsible government***, the discretion regarding what parts of British law are to remain valid in Australia, is ultimately a matter that remains in the hands of the parliaments.

As explained by Dorney QC DCJ in ***Van den Hoorn v Ellis, [2010] QDC 451*** (at 24):

> *"By way of further clarification, McPherson JA (as he then was), speaking generally for the Queensland Court of Appeal in Bone v Mothershaw [2003] 2 Qd R 600 160 noted that the common law received in Australia under the Australian Courts Act 1828 (particularly by s 24) was received as a body of common law and not of enacted law, with the effect that the common law so received in Australia in 1828 was not so received as a body of statute law: at 610. As McPherson JA goes on to observe, the whole notion of such conversion is opposed to the established view that local laws or by-laws are capable of altering the received English law [as was recognised by the High Court in Widgee Shire Council v Bonney (1907) 4 CLR 977: 161 at 610.*
>
> *The Queensland Court of Appeal decision in Carnes v Essenberg; Lewis v Essenberg [1999] QCA 339 162 concludes that it is "completely inaccurate" to say that colonial parliaments, or indeed the Parliament of Westminster, could not alter, modify or even repeal the provisions of centuries old legislation: see Chesterman J (as he then was) at p 4. Accordingly, after the Australian Courts Act 1828, enacted by the Imperial Parliament, became part of the law of Queensland upon its separate establishment in 1859, the Colonial Laws Validity Act 1865, also passed by the Imperial Parliament, removed doubts about the extent to which Australian Colonial Parliaments could alter imperial legislation as it applied to the colonies: at p 5. This had the consequence that no colonial law was void on the ground that it was repugnant to the fundamental principles of English law: also p 5. As Chesterman J goes on to note, the matter is made even more explicit by s 3(2) of the Australia Act 1986, which provides that no law and no provision of any law made after it by the Parliament of a State shall be void or inoperative on a ground that it is repugnant to the laws of England or to the provisions of an existing or future Act of Parliament of the United Kingdom: also p 5."*

https://freemandelusion.com/wp-content/uploads/2020/09/van-den-hoorn-v-ellis-2010-qdc-451.pdf

Common Law Jurisdictions

The Commonwealth has its own criminal jurisdiction for offences against federal laws, however, its jurisdiction in criminal matters is more limited than that of the states. Because the Commonwealth is in transition from the common law model to the ***code model***, some Commonwealth offences are located in the *Crimes Act 1914* (Cth) and others are in the code enacted by the *Criminal Code Act 1995* (Cth), which abolished all common law offences. The *Crimes Act* will eventually be repealed when the code expands to cover all offences. The transition from being a common law jurisdiction to a statutory code jurisdiction is well underway, with New South Wales, Victoria and South Australia the last common law jurisdictions remaining in Australia. Queensland, Northern Territory, Western Australia, ACT and Tasmania are all *"statutory code jurisdictions"*, with every type of offence now detailed in legislature and codified into law.

Legal Dictionary Definitions

> ***Blacks Law Dictionary****: "As distinguished from law created by the enactment of legislatures, the common law from the judgments and decrees of the courts. Under the doctrine of Stare Decisis, common-law judges are obliged to adhere to previously decided cases, or precedents, where the facts are substantially the same."*

"Common Law: The ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts. The general body of statutes and case law that governed England and the American colonies prior to the American Revolution.

The principles and rules of action, embodied in case law rather than legislative enactments, applicable to the government and protection of persons and property that derive their authority from the community customs and traditions that evolved over the centuries as interpreted by judicial tribunals.

A designation used to denote the opposite of statutory, equitable, or civil, for example, a common-law action. The common-law system prevails in England, the United States, and other countries colonized by England. It is distinct from the civil-law system, which predominates in Europe and in areas colonized by France and Spain. The common-law system is used in all the states of the United States except Louisiana, where French Civil Law combined with English Criminal Law to form a hybrid system. The common-law system is also used in Canada, except in the Province of Quebec, where the French civil-law system prevails.

Anglo-American common law traces its roots to the medieval idea that the law as handed down from the king's courts represented the common custom of the people. It evolved chiefly from three English Crown courts of the twelfth and thirteenth centuries: the Exchequer, the King's Bench, and the Common Pleas. These courts eventually assumed jurisdiction over disputes previously decided by local or manorial courts, such as baronial, admiral's (maritime), guild, and forest courts, whose jurisdiction was limited to specific geographic or subject matter areas. Equity courts, which were instituted to provide relief to litigants in cases where common-law relief was unavailable, also merged with common-law courts. This consolidation of jurisdiction over most legal disputes into several courts was the framework for the modern Anglo-American judicial system.

Early common-law procedure was governed by a complex system of Pleading, under which only the offenses specified in authorized writs could be litigated. Complainants were required to satisfy all the specifications of a writ before they were allowed access to a common-law court. This system was replaced in England and in the United States during the mid-1800s. A streamlined, simplified form of pleading, known as Code Pleading or notice pleading, was instituted. Code pleading requires only a plain, factual statement of the dispute by the parties and leaves the determination of issues to the court.

Common-law courts base their decisions on prior judicial pronouncements rather than on legislative enactments. Where a statute governs the dispute, judicial interpretation of that statute determines how the law applies. Common-law judges rely on their predecessors' decisions of actual controversies, rather than on abstract codes or texts, to guide them in applying the law. Common-law judges find the grounds for their decisions in law reports, which contain decisions of past controversies.

Under the doctrine of Stare Decisis, common-law judges are obliged to adhere to previously decided cases, or precedents, where the facts are substantially the same. A court's decision is binding authority for similar cases decided by the same court or by lower courts within the same jurisdiction. The decision

is not binding on courts of higher rank within that jurisdiction or in other jurisdictions, but it may be considered as persuasive authority.

Because common-law decisions deal with everyday situations as they occur, social changes, inventions, and discoveries make it necessary for judges sometimes to look outside reported decisions for guidance in a case of first impression (previously undetermined legal issue). The common-law system allows judges to look to other jurisdictions or to draw upon past or present judicial experience for analogies to help in making a decision. This flexibility allows common law to deal with changes that lead to unanticipated controversies. At the same time, stare decisis provides certainty, uniformity, and predictability and makes for a stable legal environment.

Under a common-law system, disputes are settled through an adversarial exchange of arguments and evidence. Both parties present their cases before a neutral fact finder, either a judge or a jury. The judge or jury evaluates the evidence, applies the appropriate law to the facts, and renders a judgment in favor of one of the parties. Following the decision, either party may appeal the decision to a higher court. Appellate courts in a common-law system may review only findings of law, not determinations of fact.

Under common law, all citizens, including the highest-ranking officials of the government, are subject to the same set of laws, and the exercise of government power is limited by those laws. The judiciary may review legislation, but only to determine whether it conforms to constitutional requirements."

Common law: "The system of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified written laws."

Common law: "the body of law based on judicial decisions and custom, as distinct from statute law (Law) the law of a state that is of general application, as distinct from regional customs (Law) common-law (modifier) denoting a marriage deemed to exist after a couple have cohabited for several years, common-law marriage, common-law wife."

Collins English Dictionary: Com'mon law' "the system of law originating in England, based on custom or court decisions rather than civil or ecclesiastical law."

Random House Kernerman Webster's College Dictionary: ***Common law*** - (civil law) "a law established by following earlier judicial decisions case law, precedent service - (law) the acts performed by an English feudal tenant for the benefit of his lord which formed the consideration for the property granted to him civil law - the body of laws established by a state or nation for its own regulation."

Common law - "a system of jurisprudence based on judicial precedents rather than statutory laws; "common law originated in the unwritten laws of England and was later applied in the United States" case law, precedent law, jurisprudence - the collection of rules imposed by authority; "civilization presupposes respect for the law"; "the great problem for jurisprudence to allow freedom while enforcing order". Common law[kom-uhn-law]

The system of law originating in England, as distinct from the civil or Roman law and the canon or ecclesiastical law. the unwritten law, especially of England, based on custom or court decision, as distinct

from statute law. the law administered through the system of courts established for the purpose, as distinct from equity or admiralty."

Common law 14th century: "the body of law developed in England primarily from judicial decisions based on custom and precedent, unwritten in statute or code, and constituting the basis of the English legal system and of the system in all of the United States except Louisiana.

Common law - "One of the two major legal systems of the modern Western world (the other is civil law), it originated in the UK and is now followed in most English-speaking countries. Initially, common law was founded on common sense as reflected in the social customs. Over the centuries, it was supplanted by statute law (rules enacted by a legislative body such as a Parliament) and clarified by the judgments of the higher courts (that set a precedent for all courts to follow in similar cases). These precedents are recognized, affirmed, and enforced by subsequent court decisions, thus continually expanding the common law.

In contrast to civil law (which is based on a rigid code of rules), common law is based on broad principles. And whereas every defendant who enters a criminal trial under civil law is presumed guilty until proven innocent, under common law he or she is presumed innocent until proven guilty."

Parliaments in a Federation are not Supreme

Wayne Glew claims that Parliaments are not supreme or sovereign, relying on cherry-picked passages in pages ***676*** and ***791*** of *The Annotated constitution of the Australian Commonwealth* by John Quick and Robert Garran, which he uses in response to the well established doctrine of Parliamentary Sovereignty.

> "*The Parliament is not supreme, and the very essence of the Federation is that it should not be so.*" …
>
> *"The Federal Parliament and the State Parliaments are not sovereign bodies, they are legislatures with limited powers, and any law which they attempt to pass in excess of those powers is no law at all, it is simply a nullity, entitled to no obedience."*

I don't use the term 'cherry-picked' lightly either, because Robert Garran actually goes into great detail explaining this notion in ss 160, "*The Plenary Nature of the Powers*" (page 509), in ss 330(3) *"As a Federal Constitution"* (page 794), and also ss 444 "*The States"* (page 928).

Of course the Commonwealth Parliament is not supreme or sovereign in an absolute sense, as in any federalist structure the legislative powers are divided between the Commonwealth and the States, which each having specific areas in which they can legislate.

If the Commonwealth Parliament was sovereign, (as was Westminster) there would be no need for State Parliaments, Residual or Concurrent Legislative Powers, every area of law would be Exclusive to the Commonwealth Parliament. This is simply not the case, as Quick and Garran make clear. It must be difficult to comprehend this point when one is in denial that the States are in sole possession of the sphere of Residual Legislative Powers. (***See page 935***)

> RESIDUARY LEGISLATIVE POWERS.—The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal, and social powers, including control over :

The Parliaments, both State and Commonwealth, are only supreme and sovereign over the particular sphere of powers allocated in the Constitution. If they legislate outside of their particular sphere, the law is ultra vires, unconstitutional, and entitled to no obedience at all. The Commonwealth is sovereign and supreme in the sphere of Exclusive and Concurrent Legislative Powers, and the States are sovereign and supreme in the sphere of Residual Legislative Powers.

As Robert Garran states on ***page 794***:

> *"The Constitution draws a line between the enumerated powers assigned to the Federal Government and the residue of powers reserved to the State Governments. Both sets of Governments are limited in their sphere of action, but within their several spheres they are supreme."*

794 COMMENTARIES ON THE CONSTITUTION. [Sec. 76.

(3.) *As a Federal Constitution.*—The Constitution of the Commonwealth is a Federal Constitution; it establishes a government of limited and enumerated powers. The Federal Parliament is not, like the British Parliament, sovereign; it is not even, like the Parliament of the colonies before Federation, invested with powers which, within its territorial jurisdiction, are practically sovereign; its authority is limited to specified subjects. The Constitution draws a line between the enumerated powers assigned to the Federal Government and the residue of powers reserved to the State Governments. Both sets of Governments are limited in their sphere of action; but within their several spheres they are supreme. (See Note, "Plenary Nature of Powers," § 160, *supra*.) The canons of interpretation applicable to such a Constitution as this, in order to determine the existence and extent of a power, have been clearly and logically laid down by Chief Justice Marshall and other American Judges. The guiding principle may be thus stated:—The Federal Government can have no power which, on a reasonable construction of the whole Constitution, has not been given expressly or by necessary implication. But when once it has been determined that the Federal Government has power over the subject matter, the scope of the power, and mode of giving effect to it, will receive a broad and liberal construction. The power of the Federal Parliament, though limited to specified objects, is plenary as to those objects. (Per Marshall, C.J., Gibbons *v.* Ogden, 9 Wheat. 1.)

On the same page, there is a note, *"See ss 160, The Plenary Nature of the Powers."* this section on ***page 509***, highlights the plenary or absolute nature of the powers within these spheres, when made by their respective parliaments. They are, as Quick and Garran note, as plenary as the Imperial Parliament itself.

§ 160. "Legislative Powers."

This important section, containing 39 sub-sections, enumerates the main legislative powers conferred on the Federal Parliament. They are not expressly described as either exclusive powers or concurrent powers, but an examination of their scope and intent, coupled with subsequent sections, will show clearly that, whilst some of them are powers which either never belonged to the States, or are taken from the States and are vested wholly in the Federal Parliament to the exclusion of action by the State legislatures, others are powers which may be exercised concurrently by the Federal Parliament and by the State legislatures.

CLASSIFICATION OF POWERS.—The powers conferred on the Federal Parliament may be classified as (1) the new and original powers not previously exercised by the States, such as "Fisheries in Australian waters beyond territorial limits," "external affairs," "the relations of the Commonwealth with the islands of the Pacific," &c.; (2) old powers previously exercised by the colonies and re-distributed, some being (*a*) exclusively vested in the Federal Parliament, such as the power to impose duties of customs and excise, and the power to grant bounties on the production or export of goods, after the imposition of uniform duties of customs; and others being (*b*) concurrently exercised by the Federal Parliament and the State Parliaments such as taxation (except customs and excise), trade and commerce (except customs, excise, and bounties), quarantine, weights and measures, &c. The rule of construction is, that the legislative authority of the Federal Parliament with respect to any subject is not to be construed as exclusive, "unless from the nature of the power, or from the obvious results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion that the power was intended to be exclusive;" otherwise, "the true rule of interpretation is that the power is merely concurrent." (Story, Comm., § 438.)

PLENARY NATURE OF THE POWERS.—An important point to consider is whether the Legislative powers vested in the Federal Parliament are to be regarded as plenary, absolute, and *quasi*-sovereign, or whether they are merely entrusted to the Federal Parliament as an agent of the Imperial Parliament, so as to come within the effect of the maxim *delegatus non potest delegare* (Broom's Leg. Max. 5th ed. p. 840), according to which a person or body to whom an office or duty is assigned by law cannot lawfully devolve that office or duty on another unless expressly authorized. The distinction between the two classes of powers, plenary and delegated, was discussed by the Privy Council in the case of The Queen *v.* Burah (1878), 3 App. Ca. p. 889. The question there raised was the legality of a section of an Act passed by the Governor-General in Council of India, conferring on the Lieutenant-Governor of Bengal the power to determine whether the Act or any part of it should be applied to certain districts. The Privy Council, per Lord Selborne, said:—

"Where plenary powers of legislation exist as to particular subjects, whether in an imperial or a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the Legislative powers which it from time to time conferred." Per Lord Selborne, The Queen *v.* Burah, 3 App. Ca. 906.)

At the same time their Lordships were of opinion that the Governor-General in Council could not create in India, and arm with general legislative authority, a new legislative body not created or authorized by the Imperial Act constituting a Council.

In the case of Hodge *v.* The Queen (1883), 9 App. Ca. 117, the question raised for the decision of the Privy Council was the constitutionality of the Liquor License Act (1877), ss. 4, 5, by which the Provincial Legislature of Ontario gave authority to a Board of Commissioners to enact regulations for the government of taverns. The appellant had been convicted for a breach of one of the regulations passed by the Commissioners, and he appealed on the grounds (*inter alia*) that the British North America Act, 1867, conferred no authority on the Provincial Legislatures to delegate their powers to Commissioners or any other persons; that a Legislature committing the power to make regulations to agents or delegates thereby effaced itself; and that the power conferred by the Imperial Parliament on the local Legislatures could be exercised in full by these bodies only, according to the maxim *delegatus non potest delegare*. The Privy Council in considering the legislative power of the Provincial Legislatures pointed out the difference between their constitution and that of the Legislative Council of India.

"They are in no sense delegates of, or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province, and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its power intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide. (Per Sir B. Peacock: Hodge *v.* The Queen, 9 App. Ca. 132.)

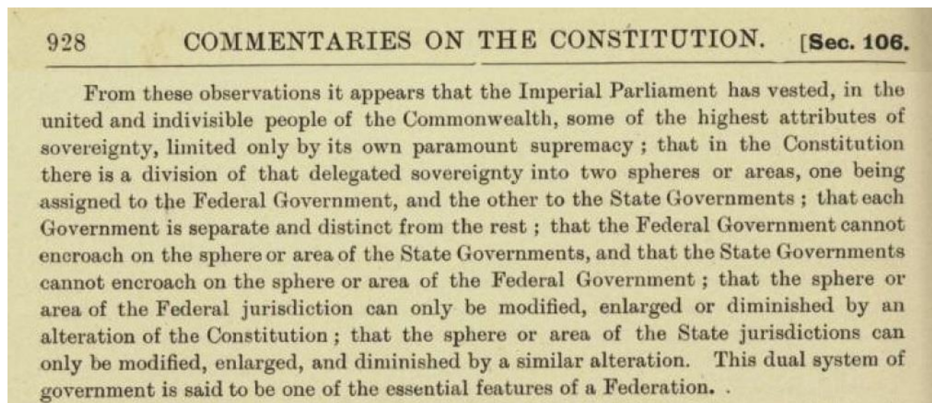
Applying the principles established in the foregoing cases to the Constitution of the Commonwealth, we may draw the conclusions: (1) As the words of the Imperial Act, creating the Federal Parliament and conferring on it legislative powers, are similar in substance and intent to those of the British North America Act, conferring exclusive legislative authority, it follows that the Federal Parliament is in no sense a delegate or agent of, or acts under any mandate from, the Imperial Parliament. (2) Its authority within the limits prescribed by the Constitution are as plenary and ample as the Imperial Parliament in its plenitude possessed and could bestow. (3) Within those limits the Federal Parliament can do what the Imperial Parliament could do, and among other things it can entrust to a body of its own creation power to make by-laws and regulations respecting subjects within its jurisdiction.

LIMITATIONS OF FEDERAL LEGISLATIVE POWER.—As we proceed with an analytical examination of section 51 it will be seen that whilst several of its sub-sections contain grants of legislative power in general and unlimited terms, the grants conveyed by other sub-sections are qualified or subject to restraints. These are known as constitutional limitations. Take sub-section 1. There, the Federal Parliament is assigned power to legislate respecting trade and commerce "with other countries and among the States;" the words quoted are words of limitation excluding from Federal control the internal commerce of each State. This is obviously a federal limitation, justifiable by considerations of federal policy. It is not founded on any distrust of the Federal Legislature; it is not designed for the protection of individual citizens of the Commonwealth against the Federal Legislature. It is, in fact, one of the stipulations of the federal compact. So the condition annexed to the grant of taxing power is, that there must be no discrimination between States in the exercise of that power. This, again, is not a limitation for the protection of private citizens of the Commonwealth against the unequal use of the taxing power; it is founded on federal considerations; it is a part of the federal bargain, in which the States and the people thereof have acquiesced, making it one of the articles of the political partnership, as effectually as other leading principles of the Constitution. Another federal limitation annexed to a grant of legislative power is that bounties granted by the Federal Parliament "shall be uniform throughout the Commonwealth." The authority of the Federal Parliament over bounties is fettered in the same manner and for the same reasons that its authority to tax is fettered.

As also noted in ***Durham Holdings Pty Ltd v New South Wales (1999) HCA 7***:

> *"In **Union Steamship Co of Australia Pty Ltd v King (1988) HCA 55**, the Court stated that, within the limits of the grant, a power such as that conferred on the New South Wales Parliament by s 5 of the Constitution Act 1902 (NSW) to make laws "for the peace, welfare, and good government of New South Wales" is "as ample and plenary as the power possessed by the Imperial Parliament itself". Moreover, at the time of the 1990 Act, the Australia Act 1986 (Cth) was in force. Section 2(2) thereof declared and enacted that the legislative powers of each State Parliament included all legislative powers that Westminster might have exercised before the commencement of that Act for the peace, order and good government of the State."*

On ***page 928***, Robert Garran makes very clear that the Commonwealth Government cannot encroach on the sphere of the Residual Legislative Powers... they are solely the possession of the State Governments, and they are each sovereign over their own sphere of legislative powers.


928 COMMENTARIES ON THE CONSTITUTION. [Sec. 106.

From these observations it appears that the Imperial Parliament has vested, in the united and indivisible people of the Commonwealth, some of the highest attributes of sovereignty, limited only by its own paramount supremacy; that in the Constitution there is a division of that delegated sovereignty into two spheres or areas, one being assigned to the Federal Government, and the other to the State Governments; that each Government is separate and distinct from the rest; that the Federal Government cannot encroach on the sphere or area of the State Governments, and that the State Governments cannot encroach on the sphere or area of the Federal Government; that the sphere or area of the Federal jurisdiction can only be modified, enlarged or diminished by an alteration of the Constitution; that the sphere or area of the State jurisdictions can only be modified, enlarged, and diminished by a similar alteration. This dual system of government is said to be one of the essential features of a Federation. .

A point that must be taken into consideration when reading various parts of Quick and Garran's commentary, is that it is the 1901 perspective in relation to the supremacy of the Imperial Parliament, ***which has since become obsolete***. We were, at the time, still subject to the *Colonial Laws Validity Act 1865*, which provided that colonial laws were invalid if they were repugnant with UK law. When the British Empire ended and national status emerged, these external restrictions ceased, and constitutional powers could be given their full scope. This changed occurred on a Commonwealth level with the adoption of the *Statute of Westminster 1931* by Australia in 1942, and on a State level with the passing of the *Australia Act 1986.*

"***The Annotated constitution of the Australian Commonwealth***" by John Quick and Robert Garran:

https://freemandelusion.com/wp-content/uploads/2020/11/the-annotated-constitution-of-the-australian-commonwealth.pdf

Finally though, these things are very irrelevant to the ***doctrine of Parliamentary Sovereignty***, it is a completely different subject matter. Parliamentary Sovereignty relates to the hierarchy of law-making powers within any given jurisdiction, (State or Commonwealth) and is further explained by the ***principle of Responsible Government***. Both terms describe a system where the legislature is the supreme law-making body within the particular constitutional structure.

In ***Kable v Director of Public Prosecutions (NSW) [1996] HCA 24***, Dawson J. (at 11-12) adequately explains the principle of the supremacy of Parliament, citing Lord Reid in ***Pickin v British Railways Board (1974) AC 765***. As stated in *Carnes v Essenberg [1999] QCA 339* citing Dawson J: *"There can be no doubt that Parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom."* Under the principle of Responsible Government, the Executive and Judiciary are responsible to, and answerable to, the Legislative branch. See ***R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254*** at 275; ***McGinty (1996) 186 CLR 140*** at 269; ***Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106*** (Mason C.J. at 30; Dawson J. at 20; McHugh J. at 15) ***The Engineers' Case (1920) 28 CLR***, per Knox C.J., Isaacs, Rich and Starke JJ. at p 147): *"The principle of responsible government – the system of government by which the executive is responsible to the legislature – is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution."* ***The Commonwealth v. Kreglinger and Fernau Ltd. and Bardsley (1926) 37 CLR 393***, (Isaacs J.) at p 413: *"It is part of the fabric on which the written words of the Constitution are superimposed."*

Robert R. Sudy (author) Website: **Freeman Delusion: The Organised Pseudolegal Commercial Argument in Australia** Email: **robertsudy@freemandelusion.com** * Like the page on **Facebook** Public group **Australian Pseudolaw** * Follow me on **Twitter** * Subscribe on **YouTube**.